Supreme Court, U
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No. 93-1633

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LEROY LIBERDA,
Petitioner,

v.

CITY OF LIVE OAK, TEXAS, MARK E. JACKLEY, DOUGLAS FAESLER, and TIMOTHY BRITT
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Fifth Circuit Court of Appeals commit Constitutional error in applying the standards of Shillingford v. Holmes, 634 F2d 361 (5th Cir. 1981) to the conduct of a police officer in a IV Amendment case, instead of the standard as is set forth in Graham v. Connor, 109 S. Ct. 1865 (1989)?

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PETITION FOR A WRIT OF CERTIORARI

Leroy Liberda petitions for a Writ of Certiorari to review the judgment in this case of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a-12a) is reported at 977 F2d 924. The decision of the United States District Court for the Western District of Texas, San Antonio Division is an unreported decision.

JURISDICTION

The original judgement of the Fifth Circuit Court of Appeals was entered on November 20, 1992. A timely petition for rehearing was filed which was overruled on January 15, 1993. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1), and Rule 10.1(c); a United States Court of Appeals has decided an important question of federal law in a way that conflicts with applicable decisions of this court.

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV—Searches and Seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . (Pet. App. B, 13a).

STATEMENT

A. Factual Background

On January 9, 1987, Petitioner Leroy Liberda was at his normal working day at L & R Associates. At approximately 11:30 a.m., Timothy Britt, a peace officer of the State of Texas and its political subdivision, the City of Live Oak, burst into Petitioners' place of business and employment. L & R Associations had a 6' x 8' sign outside identifying the building as an insurance agency. With his nightstick drawn, Officer Britt struck with his fist Laurie Rollins, who happened to be standing closest to the door shoved open by the officer, causing her to fall against a wall. Her mother Grace Rollins, being in close proximity to the door, and knowing her daughter was several months pregnant was first shocked and then became terrified as her daughter sought protection from the police officer. Grace Rollins could see that the officer was out of control and screaming.

Leroy Liberda and Ken Mouille, who were in different rooms in the rear part of the office, hearing the excited shouting and noise in the front of the building, went to the front office. Mr. Liberda was so shocked at how the intruder was acting that he asked, "What the hell is going on here?" The officer threw down his nightstick and drew his gun, yelling expletives and threats to kill Liberda. The police officer then assaulted Liberda with his weapon by thrusting it against Liberda's neck under his chin while threatening to kill him, causing Liberda to jump backwards, striking himself in the back on a door and also hurting his groin.

The officer alleged at trial that he was at the location because he had clocked a sports car in excess of a posted speed limit in Live Oak, a city in the suburbs of San Antonio, Texas. Subsequently, he contended that it was Mr. Mouille who was driving that automobile.

Mr. Mouille was handcuffed in the office and taken into custody. He fully cooperated and offered no resistance. No one other than Officer Britt was armed and no one threatened or constituted a threat to the officer. All during the time the police officer had unholstered his weapon, he waved it wildly, threatening to kill anyone who moved or interfered. The testimony in the record is replete with the total fear and terror that the officer brought to all persons there, including the Petitioner. The record is absent of anyone attempting in any way to interfere in his activity. The Petitioner was never accused of any crime, and was lawfully upon his business premises.

Leroy Liberda and Grace Rollins were joint owners of the insurance agency, and the building which housed the agency. Leroy Liberda at the time of the incident was fifty-five years of age, and Grace Rollins was sixty-six years of age. Laurie was twenty-six. Laurie Rollins was fearful about the welfare of her unborn child and of being shot.

Grace Rollins anguished over her pregnant daughter, and the unwarranted intrusion of an armed man inter her office, threatening to kill her and everyone inside the office building. (She testified she could not believe this could happen in the United States.) Timothy Britt did not identify himself as a police officer and since he was from another city, his uniform was not like that of a San Antonio officer. In fact, he was thought possibly to be a private security officer.

Petitioner sought relief pursuant to 42 U.S.C. 1983. Petitioner alleged physical injuries, mental anguish, terror, and fear. Petitioner could not show a broken bone or a bleeding body part to support a severe physical injury as the courts below demanded, as though the right to be free from unreasonable search and seizures must **BLEED** before its violation is recognized.

B. Proceedings Below

1. District Court Proceedings

This case has been tried twice.

The original Plaintiffs in this action were four individual United States citizens, living in the Western District of Texas, San Antonio Division, who claimed damages to their persons and civil liberties under 42 USC 1983 and the IV Amendment, U.S. Constitution. Besides the Petitioner, additional Plaintiffs were Ken Mouille, Laurie Rollins and Grace Rollins. At the conclusion of the evidence by all Plaintiffs in the original trial, all Defendants moved for directed verdicts. United States District Judge Emilio Miller Garza granted a directed verdict as to all the Defendants against Laurie Rollins, Grace Rollins and Leroy Liberda. Judge Garza directed a verdict as to Douglas Faesler only, as to claims of Ken Mouille. Ken Mouille's case against the remaining Defendants, The City of Live

Oak, Texas, City of Live Oak Police Chief Mark E. Jackley, and City of Live Oak police officer Timothy Britt proceeded to a jury determination, which was adverse to Ken Mouille. Ken Mouille did not perfect any appeal from the take-nothing judgment against him.

2. The Court of Appeals' Decisions

The Plaintiffs Laurie Rollins, Grace Rollins, and Leroy Liberda appealed to the Fifth Circuit Court of Appeals, which affirmed the directed verdict as to Petitioners Laurie Rollins and Grace E. Rollins, but vacated the directed verdict and remanded the case to the U.S. District Court as to Leroy Liberda. (See Mouille, et al. v. City of Live Oak, et al, 918 F2d, 548, 550 (5th Cir. 1990).

On remand, the new trial of Leroy Liberda again came on for hearing on the 3rd day of June, 1991. The jury answered Special Interrogatory No. One adverse to the Petitioner, and pursuant to the court's instructions, answered no other additional special interrogatories.

From this adverse jury verdict, the Petitioner Leroy Liberda appealed to the Fifth Circuit Court of Appeals, which affirmed the jury verdict by a decision rendered on November 20, 1992. (See Mouille, et al v. City of Live Oak, Texas, 977 F2d 924, (5th Cir. 1992). The Petitioner's Petition for Re-Hearing was overruled by the 5th Circuit Court of Appeals on January 15, 1993. Petition for Writ of Certiorari is sought from that ruling, for the reasons set forth below.

REASONS FOR GRANTING THE WRIT

This Court should allow this writ to issue because in cases decided by the Fifth Circuit Court of Appeals, including the one from which this appeal is taken, it has amended, modified, altered, and to some extent nullified

the standard set out by this Court regulating cases involving the violation of Fourth Amendment rights. The standard as set out by this Court in Graham v. Connor, 109 S Ct. 1865 (1989) is not followed by the Fifth Circuit Court of Appeals. Rather, the Fifth Circuit Court of Appeals has engrafted a three-prong test, which additionally required a severe or a significant injury. Johnson v. Morel, 876 F2d 477 (C A 5th, 1989). In requiring a significant or severe injury, the Court below has again refused to recognize the clear mandate of this Court and was the reason the trial court rejected the Petitioner's requested jury interrogatories which use the Graham v. Connor criterion.

Additionally, the Fifth Circuit Court of Appeals held the Petitioner to the 1981 standard as set forth in Shillingford v. Holmes, 634 F2d 263 (5th Cir. 1981), which imposed upon the Petitioner the heavier burden of proving to the satisfaction of the jury not only that the Petitioner sustained a "severe" injury, but also that the police officer's conduct "was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience."

This intractable position of the Fifth Circuit Court of Appeals in the face of this court's decision in Graham v. Connor, supra, and more recently Hudson v. McMillian, ____ U.S. ____, ___, 112 S. Ct. 995, 997, 117 L.Ed.2d 156 (1992), amounts to a contumacious disregard for this court's precedents.

The rule in cases of this kind is "whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting them without regard to their underlying intent or motivation." Graham v. Connor, supra. It is not the three-pronged test as announce by the Fifth Circuit in the Johnson v. Morel case, which require the following: "A Plaintiff can thus prevail on

Constitutional excessive force claim only by proving each of these three elements:

1) A significant injury, which
2) Resulted directly and only from the use of force that was clearly excessive to the need; the excessiveness of which was

3) objectively unreasonable.

If any one of these three elements fails, so too does the Plaintiffs' claim."

Nor is the archaic and repudiated test as set forth in Shillingford, supra, the correct test for the violation of rights secured by the Constitution and laws of the United States.

It is suggested that the dissent in Johnson v. Morel, supra, eloquently and sagaciously argues the point Petitioner here presents, and to quote from such dissent, " 'severe injury' requirement is . . . inappropriate. Under that standard, a police officer could, without any justification, beat a person on the head with a club if the beating caused only a bruise. Similarly, a police officer could terrorize a non-dangerous suspect by pointing a gun at his head if the chambers of the gun are empty" (emphasis added). Applying this reasoning a step further to the facts of this case, suppose the officer had fired his pistol at the Petitioner, but missed? Such outrageous conduct, according to the Fifth Circuit Court of Appeals, would not rise to the level of a constitutional violation.

The Court of Appeals circumvented the issue presented by the Petitioner in its brief below. The issue presented was whether or not the Fifth Circuit was in error in failing to follow the Supreme Court in matters relating to Fourth Amendment cases as announced in Graham v. Connor,

supra. It decided the appeal on the question of qualified immunity, using an incorrect standard. In doing so, it utilized the standards set forth in Shillingford v. Holmes, supra, at Page 928. The Shillingford v. Holmes test was:

(i) Did the action cause sever injury;

(ii) Was the action grossly disproportionate to the need for action under the circumstances; and

(iii) Did the officer act so maliciously that it would shock the conscience.

Petitioner believes that all of these criteria were in fact met, but the requirement that they be met is Constitutional error. Shillingford v. Holmes was not the law at the time. Graham v. Connor was the law, as mandated by this Court in 1989. The Fifth Circuit in at least two non-published opinions has held the Graham v. Connor case to have retroactive effect. Therefore, the substantive standard used by the Court below has already been declared to be superseded by Graham v. Connor. (See Michael Manger v. Godfrey T. Mangold, No. 89-5513, dec'd August 28, 1989, unpublished, Pet. App. C, 14a; and Cooper v. Hosli, No. 88-3734, dec'd August 18, 1989, unpublished, Pet. App. D, 17a).

The Graham opinion itself cites Tennessee v. Garner, 471 U.S. 1, a 1985 case as authority for the rule in Fourth Amendment cases. All claims that law enforcement officers have used excessive force in the course of a . . . (seizure) . . . of a free citizen should be analyzed under the Fourth Amendment rule of reasonableness rather than substantive due process (which required excessive force among other repudiated criteria).

Obviously the Tennessee v. Garner case, supra, was in effect long before January 9, 1987, the date of this incident.

(Arguably, the police officer could be said to have not known of the law as it existed in 1987, because his training was so woefully bereft of any schooling or briefing in protecting the basic Constitutional rights of private citizens. Officer Britt testified he received hours and hours of training on how to use his weapons against people. Of course with his "tunnel vision," to which he so proudly testified, one would hardly expect him to recognize the peripheral "academic" possibility that he just might violate the Constitutional rights of everybody around him).

The result of the opinion below is that the keystone issue of the appeal, that the Fifth Circuit law was different than the law of all other Circuits and the Supreme Court, was once again avoided to yet haunt every peace officer and citizen living within the boundaries of the Fifth Circuit.

If in fact Graham v. Connor, supra, does not apply within the boundaries of the Fifth Circuit, then it is time for the U.S. Supreme Court to so state. Otherwise, even at this writing, does a peace officer know if his conduct will be actionable if he does or does not cause severe injury, which resulted from excessive force and was objectively unreasonable; or whether it will be actionable if it does not cause severe injury and does not employ excessive force, but is objectively unreasonable. Johnson v. Morel, 876 F2d 477, 480. The Fifth Circuit avoided answering this question again by declaring to be dicta any comment it would make about the Johnson case and whether it was still law after the Hudson v. McMillian, 112 S. Ct. 995 (1992) opinion, which was called to the Appellate Court's attention by Appellant-Petitioner in oral argument.

The Appellate Court having committed Constitutional error in relying on the Shillingford case and avoiding the issue present on appeal, should now be reversed and instructed to consider the appeal under the authority of

Graham v. Connor, supra, as this Court has done in other cases; or order a new trial because it was the action of the trial court based upon cases such as Johnson v. Morel, supra, that caused it to refuse the Plaintiff-Petitioner's requested jury interrogatory, asking whether the conduct of the peace officer was objectively unreasonable under the facts and circumstances of this case.

It is respectfully suggested that this Court should additionally grant this Petition under Rule 10.1(c), Rules of the Supreme Court of the United States, because the Fifth Circuit in applying the significant injury test held that the Petitioner did not show such injury and thereby ruled his rights had not been violated. The Court of Appeals seems to hold that if excessive force is not used, (i.e. injury not severe or significant) then the right to be free from unreasonable searches and seizures is not violated. This is a Fourth Amendment case. There is a fundamental right of American citizens to be free from the unreasonable and arbitrary conduct of its police officers. It is immaterial whether the police officer's conduct results in excessive force or not. The Fourth Amendment protects against the objectively unreasonable conduct of a police officer. Whether the officer bludgeons the citizen or causes a "red mark" relates only to damage and not whether the damage or injury was justified. Qualified immunity is available in determining the legitimacy of the officer's conduct.

This Court's rule in Graham v. Connor, supra, is a clear and unequivocal rule. It is easily measured by a peace officer. So, it must go without saying that a citizen of the United States has abstract rights which do not bleed but which are constitutionally as sacred as the physical body itself. The trial court and the Fifth Court of Appeals have found themselves in the untenable position of holding that unless your Fourth Amendment right is made to bleed, it has not been violated.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: April 9, 1993.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-5673

KEN MOUILLE, et al.,
Plaintiffs

LEROY LIBERDA
Plaintiff-Appellant,

v.

CITY OF LIVE OAK, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

Nov. 20, 1992

Rehearing Denied Jan. 15, 1993

Before REYNALDO G. GARZA and GARWOOD, Circuit Judges and WERLEIN,* District Judge.

REYNALDO G. GARZA, Circuit Judge:

Appellant, Leroy Liberda, commenced suit under 42 U.S.C. § 1983, alleging that his constitutional rights were violated by defendants, Timothy Britt, Mark Jackley,

* District Judge of the Southern District of Texas, sitting by designation.

Douglas Faesler, and the City of Live Oak, Texas. At the relevant times, Britt was a Live Oak police officer, Jackley was the Chief of Police of Live Oak, and Faesler was the Live Oak City Manager. The district court granted a directed verdict for all defendants against Liberda. On appeal, the fifth Circuit reversed and remanded Liberda's claims. On remand, the case was tried before a jury, which rendered a verdict for the defendants on the ground that Britt did not use excessive force. Liberda appeals certain jury instructions and Britt reasserts the affirmative defense of qualified immunity. We find that Britt is entitled to qualified immunity. Further, there is insufficient evidence against Jackley, Faesler, and the City of Live Oak. Therefore, we AFFIRM.

I. FACTS

This civil rights action arises out of the events that took place on January 9, 1987, in San Antonio, Texas. Late Friday morning, January 9, 1987, Officer Britt observed a blue Corvette exceeding the posted speed limit by 27 miles an hour. Britt attempted to stop the vehicle; however, a high speed chase ensued on interstate I-35 at speeds in excess of 95 miles per hour. Live Oak Police Lieutenant, Gary Hopper, and the police dispatcher maintained radio contact during the chase. According to the official log book, at 11:28 A.M. Britt first made radio contact, and reported that he was traveling southbound on I-35 pursuing a blue Corvette.

The blue Corvette, which was being driven by Kenneth Mouille, exited the highway at Walzem Road, and hastily pulled into the L & R Associates ("L & R") parking lot. Both Britt and Mouille emerged from their respective cars, and Britt informed Mouille that he was under arrest. Britt's police car was a "marked unit," and he was wearing the distinctive blue police uniform emblazoned with a salient badge, silver name tag, and police department emblems.

Mouille unmistakably knew that he had been chased by a police car, and that Britt was a police officer. Mouille responded to Britt's attempted arrest with a few expletives, and then bolted into L & R. The events that transpired inside the L & R offices form the basis of this suit.

Mouille sped into the building and then into the front office of L & R, shutting the door behind him. Mouille was yelling as he ran into the office, and the entire commotion stirred up everyone inside, especially Grace Rollins. Grace Rollins, who is Mouille's mother, is also Liberda's business partner at L & R, which is an insurance agency.

Britt did not know what he would encounter when he opened L & R's front door so he had his nightstick drawn, ready for the unpredictable. Britt threw open the door with a great deal of force, which knocked some plaques off the wall. Rollins immediately interposed herself between Britt and her son. Britt informed her about the high speed chase, and told her that her son was under arrest. Britt then attempted to handcuff Mouille. Although Mouille pushed and shoved, Officer Britt eventually managed to handcuff Mouille, despite his uncooperativeness.

Just after Britt handcuffed Mouille, Leroy Liberda and Laurie Rollins entered the front office. Liberda and Laurie Rollins audaciously approached Britt to within arm's length, screaming at him. Britt was faced with a volatile situation and had to make an instinctive decision. He pulled out his revolver and admonished everyone to back off.

Liberda contends that Britt shouted expletives, cocked his gun, shoved it in Liberda's neck, and then threatened to blow his head off. Britt contends that the gun did not touch Liberda. As a result, Liberda jumped back into a door knob and allegedly suffered debilitating back and leg injuries.[1]

1. Liberda contends that he must elevate his leg in order to alleviate the continuing pain. Consequently, he is unable to conduct recruiting

Simultaneously, Liberda also urinated in his pants. Britt concedes that the sight of the gun caused Liberda to jump backwards into the door. Approximately three minutes elapsed from the time Britt entered the office until the time he emerged with Mouille.

Once outside the building, Britt placed Mouille in the backseat of his patrol car and contacted headquarters. At 11:36 A.M., Britt informed the dispatcher that Mouille was in custody. Two minutes later, at 11:38 A.M., Britt informed the dispatcher the street address for L & R. Minutes after Mouille was placed in custody, Lieutenant Hopper arrived at L & R. Officer Hopper interviewed each of the witnesses. By 11:56 A.M., Britt reported that he was en route to police headquarters with Mouille.

II. PROCEDURE

Liberda, along with Mouille, Grace Rollins, and Laurie Rollins, filed a Section 1983 action against the defendants alleging a violation of their fourth amendment rights. The case was tried before a jury. At the close of plaintiff's case, each defendant moved for a directed verdict. The district court dismissed the claims by Liberda, Grace Rollins, and Laurie Rollins. Further, the district court directed a verdict for Faesler against all claims by Mouille, but denied the directed verdict motions by Britt, Jackley, and the City of Live Oak.

Liberda, Grace Rollins, and Laurie Rollins appealed from the adverse determination by the district court. Subsequently, a panel of the court affirmed the directed verdicts against Grace Rollins and Laurie Rollins, but reversed the verdict against Liberda, and remanded for a new trial. *See Mouille v. City of Live Oak*, 918 F.2d 548, 550 (5th Cir. 1990). On remand, the jury, by special verdict,

seminars because he cannot rest his leg. Further, Liberda contends that the incident caused him embarrassment.

found that Britt had not used excessive force against Liberda, and the district court entered judgment for the defendants. Liberda appeals.

III. DISCUSSION

A. Qualified Immunity—Britt

[1] Britt answers Liberda's Section 1983 claims with the affirmative defense of qualified immunity. Qualified immunity determinations implicate a multi-faceted framework. This case represents a procedurally unique setting in which to discuss qualified immunity. Qualified immunity is normally raised prior to trial at the summary judgment stage. Indeed, the thrust underlying the affirmative defense of qualified immunity is to allow public officials to avoid time consuming, and exhaustive litigation. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054, 1057 (5th Cir.1992).

A prior panel of our court has already decided that Britt was not entitled to qualified immunity following a directed verdict in favor of the defendants. *See Mouille*, 918 F.2d at 551. The *Mouille* panel remanded Liberda's claims to the district court where he commenced a second trial—this time around the defendants were able to introduce their own evidence. Crucial evidence that established Britt was not entitled to qualified immunity in the first trial was either: (i) ineffectively presented by Liberda; or (ii) sufficiently eviscerated by the defendants during the second trial.

In *Mouille*, the plaintiffs had proven that Britt did not enter the L & R offices until thirty minutes after Mouille had parked his car.[2] The current record is bereft of any

2. Presumably, the plaintiffs were able to establish the thirty minute interval through their own testimony, and this testimony stood

evidence upon which to conclude that thirty minutes elapsed from the time Mouille pulled into the parking lot until the time Britt burst through the door.[3] Therefore, the life blood of the *Mouille* panel's conclusion: that Officer Britt's actions were "bizarre and shockingly unreasonable," is emasculated.[4] Significantly, the current record establishes that eight minutes elapsed from Britt's last radio contact during the chase on I-35 until his next report when Britt informed the dispatcher that Mouille was in custody. The foregoing merely establishes that we are not bound by the *Mouille* decision.

[2] Initially, plaintiff must allege a violation of a clearly established constitutional right. *See Siegert v. Gilley*, ___ U.S. ___, ___, 111 S.Ct. 1789, 1792, 114 L.Ed.2d 277, 287 (1991). Liberda alleges that Officer Britt used excessive force against him during the course of Mouille's arrest. Currently, allegations of excessive use of force implicate the fourth amendment's guarantee of freedom from unreasonable "seizures." See *Graham v. Connor*, 490 U.S. 386, 394-95, 109 S.Ct. 1865, 1870-71, 104 L.Ed.2d 443 (1989).[5] Liberda's allegations fall under the broad definition of "seizure" for fourth amendment purposes.[6] However, prior to *Graham*, the law in this Circuit clearly held that excessive use of force claims were

unrebutted on appeal because the directed verdict barred the defendants from introducing their evidence.

3. In the second trial Britt testified that he immediately pursued Mouille into L & R Associates. Further, his testimony was corroborated by the police log. Moreover, Britt's radio broadcasts were monitored and corroborated by Lieutenant Hopper and the radio dispatcher.

4. The *Mouille* panel concluded that it was bound to construe the record most favorably to Liberda because the case was appealed following a directed verdict. *See Mouille*, 918 F.2d at 553. Favorable conclusions in the first appeal included not only the primary determination of the thirty minute interval, but secondary inferences such as: (i) given the time lag, Britt could have called for backup; and (ii) there was no exigency or excitement to justify such disruptive pursuit.

substantive due process clause in the fourteenth amendment. *See Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. Unit A Jan. 1981).

[3] Categorization of the precise constitutional rubric violated by excessive force has been subject to the sands of temporality. Be that as it may, the underlying standard throughout has always been that qualified immunity operates as a cloaking device from personal liability for police officers who act in an objectively reasonable manner. *See Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Under *Anderson* and its progeny, the reasonableness of action taken must be assessed in light of the "clearly established" law in effect at the time. *See Anderson*, 483 U.S. at 639, 107 S.Ct. at 3038; *see also Jackson v. Beaumont Police Dep't*, 958 F.2d 616, 620 (5th Cir.1992); *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1184 (5th Cir.1990).

[4, 5] Approached from a different vantage point: police officers are free to exercise their discretion as long as they do not trample over clearly established legal rights. *See Anderson*, 483 U.S. at 639, 107 S.Ct. at 3038. The

5. The Supreme Court stated in *Graham* that excessive use of force claims fall under the fourth amendment's guarantee of the right "to be secure [from] . . . unreasonable . . . seizures" of the person. *See Graham*, 490 U.S. at 394, 109 S.Ct. at 1871. Further, Chief Justice Rehnquist expressly disavowed an approach to excessive force claims under the substantive due process clause of the fourteenth amendment. *See id.* at 395, 109 S.Ct. at 1871.

6. In *Graham*, the Supreme Court defined "seizure" under the fourth amendment as a "means of physical force or show of authority, . . . in some way restrain[ing] the liberty of a citizen." *See Graham*, 490 U.S. at 395, 109 S.Ct. at 1871 (*citing Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 1879 n. 16, 20 L.Ed.2d 889 (1968)). It further required that *all claims that officers have used excessive force* . . . in the course of an arrest . . . should be analyzed under the fourth amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.* (emphasis added).

rationale behind the "clearly established law" requirements rests on the notion that police action should not be subject to retroactive application of newly created legal standards. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

Furthermore, the approach is objective in nature so that all officials will conduct their activities subject to the same standards. Moreover, where clear legal rights are not involved it is better to have a policy that encourages action, without the fear of Monday morning quarterbacking. Therefore, even if we conclude, with the benefit of hindsight, that Britt did violate Liberda's constitutional rights, but we also conclude that a reasonable officer placed in Britt's shoes would have acted similarly—then Britt is entitled to the protective shroud of qualified immunity. *See Duckett v. City of Cedar Park*, 950 F.2d 272, 280 (5th Cir.1992).

A threshold inquiry into what is "objectively reasonable" must establish the law in effect on January 9, 1987. Applying the "clearly established law" requirement to the present case points us to *Shillingford*. Prior to the Supreme Court's decision in *Graham*, the controlling legal precedent in this Circuit held that the substantive due process clause of the fourteenth amendment governed excessive use of force claims. *See Simpson v. Hines*, 903 F.2d 400, 403 (5th Cir.1990) (*citing Shillingford*, 634 F.2d at 265). *Shillingford* stated:

> If the state officer's action caused severe injuries, was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience, it should be redressed under Section 1983.

Id.

[6] The *Shillingford* decision sets forth a conjunctive

tripartite test to determine the reasonableness of an officer's actions. The standard has coalesced and can be simply stated: (i) did the action cause severe injury; (ii) was the action grossly disproportionate to the need for action under the circumstances; and (iii) did the officer act so maliciously that it would shock the conscience. *See id.* Therefore, if any of the three elements of the test are missing, then the plaintiff has not suffered a violation of constitutional magnitude. This test represents the clearly established law which guided law enforcement as of January 9, 1987.

[7] Applying the standard to the case at hand, we must first place ourselves, as reasonable officers, in Britt's shoes. Next, we have to account for Britt's sudden and unexpected predicament—trying to discount the benefit of hindsight. Certainly, we do not want to hold Britt to standards higher than what reasonable peers of his would have done under the same circumstances.

The most relevant prong in the three part inquiry for our purposes is number two: whether Britt's actions were grossly disproportionate to the need for action. Britt acted reasonably when he chased Mouille into the L & R offices because he was trying to evade arrest. Perhaps Britt may have opened the office door with less vigor. However, none of the people inside that office were entitled to interfere with Britt's arrest. Indeed, citizens have no right to intervene in lawful police business. Further, Liberda's actions were undoubtedly inappropriate. We do not wish to countenance like behavior in the future.

When Britt saw Liberda approaching him menacingly—he did not know what Liberda's intentions were. If he were to passively await the outcome he may have been injured or even worse. The constitution does not empower private citizens to imperviously interfere with police business. The jury found that Britt did not use excessive force and we

too agree that Britt acted reasonably when he attempted to quell a volatile situation under rapidly evolving and unpredictable circumstances. Therefore, Britt's actions were not grossly disproportionate to the need for action.

Secondly, we focus on the third prong of *Shillingford* and consider whether Britt acted so maliciously that it shocks the conscience. Objectively, we must analyze Britt's actions and consider whether a reasonable officer would use a firearm to protect himself when approached by unknown individuals during the course of an arrest. We conclude that Officer Britt's actions were objectively reasonable and not excessive, given the circumstances. Indeed, they do not shock the conscience.

The severe injury prong of *Shillingford* need not be addressed. In fact, the jury below was charged on the basis of significant injury. To be sure, the law on excessive force claims, as it currently stands in this Circuit, requires that plaintiffs must prove significant injury. *See Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir.1989) (en banc) (per curiam). The *Johnson* holding has been called into doubt by *Hudson v. McMillian*, ___ U.S. ___, ___. 112 S.Ct. 995, 997, 117 L.Ed.2d 156 (1992) (excessive force claim tenable in eighth amendment context even without significant injury).[7] We expressly decline to decide whether *Johnson*'s vitality has been impaired by *Hudson*. Incidently, anything that we say regarding *Johnson* would be dicta for two reasons: (i) because we find that Britt is entitled to qualified immunity under *Shillingford*'s second and third prongs, we need not address the first prong; and (2) Britt is not bound by legal developments that occurred after 1987.

7. Two recent Fifth Circuit cases have recognized the tension between *Johnson* and *Hudson*. *See King v. Chide*, 974 F.2d 653, 657 (5th Cir.1992); *Knight v. Caldwell*, 970 F.2d 1430, 1432 (5th Cir.1992). However, both cases declined to decide whether *Hudson* in fact impugned *Johnson*.

B. Jackley and Faesler

[8] Well settled Section 1983 jurisprudence establishes that supervisory officials cannot be held vicariously liable for their subordinates' actions. *See Monell v. Department of Social Services*, 436 U.S. 658, 691-95, 98 S.Ct. 2018, 2036-38, 56 L.Ed.2d 611 (1978); *Thibodeaux v. Arceneaux*, 768 F.2d 737, 739 (5th Cir.1985) (per curiam). Supervisory officials may be held liable only if: (i) they affirmatively participate in acts that cause constitutional deprivation; or (ii) implement unconstitutional policies that causally result in plaintiff's injury. *See Thompkins v. Belt*, 828 F.2d 298, 303 (5th Cir.1987); *see also Grandstaff v. City of Borger*, 767 F.2d 161, 169-70 (5th Cir.1985), *cert. denied*, 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 686 (1987). We find a dearth of evidence in the record, and conclude that Liberda has failed to substantiate allegations as to any unconstitutional policies.

C. City of Live Oak

[9,10] Municipalities can be held vicariously liable for the actions of their employees. *See City of Canton v. Harris*, 489 U.S. 378, 395, 109 S.Ct. 1197, 1208, 103 L.Ed.2d 412 (1989). Inadequate police training may serve as a predicate for Section 1983 liability only where it amounts to deliberate indifference to constitutional rights. *Id.* at 379, 109 S.Ct. at 1199. Again, Liberda has failed to make out a case against the municipality.

D. Failure to submit Liberda's interrogatories

Because we find that Britt is entitled to qualified immunity and we find no evidence against Jackley, Faesler, and the city of Live Oak—we find both the interrogatories that were submitted and the interrogatories that were excluded to be superfluous. Any error with regard to interrogatories is entirely subsumed within our finding of

qualified immunity.

E. District court's failure to submit a letter from Live Oak's City Manager Faesler to Police Chief Jackley.

[11] Liberda contends that the trial court erred in excluding a letter written by Faesler, dated April 13, 1988, which proposed that Jackley resign from his job as police chief. Liberda contends that the letter was relevant to proving a causal link between municipal policy and Britt's excessive use of force. The letter alleges that Jackley: (i) mishandled evidence; (ii) improperly seized pornography for personal use; (iii) engaged in voyeuristic behavior with a cadaver; (iv) "mooned" subordinate officers; (v) pulled down an officer's pants during a party; (vi) trespassed on private property; (vii) improperly seized and mishandled narcotics; and (viii) shot at animals. While the letter does set forth exceedingly embarrassing allegations about Jackley, it does not prove that Live Oak officers received inadequate training. We find that the exclusion of this evidence was well within the discretion of the trial court.

IV. CONCLUSION

Officer Britt is entitled to qualified immunity primarily because he did not use disproportionate force under the circumstances. Therefore, although Britt was not entitled to qualified immunity in *Mouille* he was able to refute the unchallenged allegations of Liberda the second time around. We hold that Britt proved his actions were immune. Liberda failed to make out a case against Faesler, Jackley, and the City of Live Oak. Consequently, the jury instructions drop out of the picture altogether because our finding of qualified immunity renders them meaningless. Further, the exclusion of the letter was entirely within the discretion of the trial court. AFFIRMED.

APPENDIX B

UNITED STATES CONSTITUTION PROVISION

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.88-3734
(Summary Calendar)

ROY COOPER,
Plaintiff-Appellant,

VERSUS

EDWIN HOSLI, ET AL.,
Defendants, Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 87-3932 "F"(6))

(AUGUST 18, 1989)

Before POLITZ, KING and SMITH, Circuit Judges.
POLITZ, Circuit Judge:*

Invoking 42 U.S.C. sec. 1983 and Louisiana tort law, Roy Cooper filed a state court suit against the City of New Orleans and two of its police officers, seeking damages for injuries caused by the bites of a police dog used during his

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of sell-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

arrest. The matter was removed to federal court and by consent was tried to a jury before a magistrate. The jury returned a verdict for the defendants and Cooper timely appealed. The intervening decision by the Supreme Court in Graham v. Conner, ____ U.S. ____, 109 S.Ct. 1865, 104 L.Ed.2d 443, 57 U.S.L.W. 4513 (May 15, 1989), mandates a reversal and remand.

Cooper was arrested inside a school building during the early morning hours. He was charged and convicted of criminal trespass. In the course of his arrest he was bitten by a police dog, resulting in a significant disability of his left arm. Cooper filed suit for violations of this rights under the first, fourth, and fourteenth amendments, and for breach of Louisiana tort law, claiming that the police dog needlessly attacked him on command and continued the attack after he surrendered. The police officers countered that Cooper had attacked the dog and that the dog acted in self-defense.

The magistrate instructed the jury that in order to prevail on his section 1983 claim Cooper had to demonstrate that the officers' actions were objectively unreasonable and

> grossly disproportionate to the need for action under the circumstance and . . . inspired by malice rather than merely carelessness or unwise excess of zeal so that the officers' actions amounted to an abuse of official power that shocks the conscious [sic].

In Graham v. Connor the Supreme Court rejected this circuit's precedents in holding that suits involving claims of excessive force during an arrest or investigatory stop implicate the fourth amendment guarantee against unreasonable seizure, not the fourteenth amendment due process clause. The Court stated:

> Today we . . . hold that all claims that law enforcement officers have used excessive force—deadly or not—

> in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach (emphasis in original).

57 U.S.L.W. at 4516. See our recent decision in Johnson v. Moral, ____ F.2d ____ (5th Cir. 1989) (en banc), No. 86-3662 (5th Cir. July 5, 1989).

The Court underscored that the reasonableness test is objective, not subjective, concluding:

> An officer's evil intentions will not make a Fourth Amendment violation out of an objectively unreasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

Id.

It is now manifest that proof of malice is not required in a section 1983 case involving the use of excessive force in an arrest setting. The magistrate's instruction to the contrary was erroneous and the verdict rejecting the section 1983 claim must be reversed and remanded for new trial.

Albeit calling for application of a different standard, the state law battery claim involves the intentional use of force and is so factually intertwined with the excessive force claim that we cannot be certain that the erroneous instruction on the section 1983 claim did not confuse and mislead the jury. Accordingly, in the interest of justice we reverse that portion of the verdict and remand for retrial of the state law claim.

REVERSED and REMANDED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.89-5513
Summary Calendar

MICHAEL MANGER,
Plaintiff-Appellant,

VERSUS

GODFREY T. MANGOLD, ET AL.,
Defendants, Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-86-CA-372)

(AUGUST 18, 1989)

Before HIGGINBOTHAM, DAVIS, and SMITH, Circuit Judges.
PER CURIAM:*

The plaintiff appeals from a take-nothing judgment entered pursuant to a jury verdict. The jury had been charged, on the issue of excessive force, under the law as

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it existed prior to the Supreme Court's most recent pronouncement on excessive force, Graham v. Connor, 109 S.Ct. 1865 (1989). The main point at issue on appeal appears to be whether Graham is to be applied retroactively.

"The usual rule is that federal cases should be decided in accordance with the law existing at the time of decision." Goodman v. Lukens Steel Co., 482 U.S. 656, 662 (1987) (citing cases). Indeed, subsequent to the trial of this matter we have applied Graham to cases decided by the district courts before Graham but pending on appeal when Graham was decided. See, e.g., Johnson v. Morel, 876 F.2d 477 (5th Cir. Jul. 5, 1989) (en banc) (per curiam); Brown v. Glossip, No. 88-2908, slip op. 5165 (5th Cir. Aug. 4, 1989); Cooper v. Hosli, No. 88-3734 (5th Cir. Aug. 18, 1989) (unpublished) (copy attached).

Thus, we conclude that Graham is to be applied to this case. This is so especially in light of the fact that the jury here rendered a verdict adverse to the plaintiff, based upon a charge fashioned in part pursuant to Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1985). In Brown v. Glossip, we noted that "[i]t is clear, however, that the new constitutional test [under Graham] is not more onerous than that of Shillingford." Slip op. at 5167. We intimate no view as to how the plaintiff should fare under the Graham test; however, we remand so that the district court can review this case in light of Graham and its progeny.

VACATED and REMANDED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.91-5673

KEN MOUILLE, ET AL.,
Plaintiffs
LEROY LIBERDA
Plaintiff-Appellant,
versus
THE CITY OF LIVE OAK, TEXAS, ET AL.,
Defendants, Appellees.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

( )

Before REYNALDO G. GARZA and GARWOOD, Circuit Judges, and WERLEIN, District Judge.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and number cause be and the same is hereby denied.

ENTERED FOR THE COURT:

sig: Reynaldo G. Garza .
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

*District Judge of the Southern District of Texas, sitting by designation.